IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
Appeal No. 1192 OF 1999
In
Chamber Summons No. 1058 of 1998
In
Summary Suit No. 889 of 1997.

N. Chandra Chems,)
a sole proprietory concern,)
by Shri Jiten C. Padia,)
proprietor of N. Chandra Chems,)
having their office at 7/58, Seva Kunj,)
Kamla Nehru Cross Road No.2)
Kandivli (West), Mumbai 400 067.) ... Appellant

vs.

1. Varma Mukherji Pvt. Ltd.,)
   a company registered and)
   incorporated under the Companies)
   Act, 1956, having its registered)
   office at Opp. Sanghani Estate,)
   L.B.S. Marg, Ghatkopar (West),)
   Mumbai 400 086.)
2. Mr. B.R. Mukherji ,)
3. Mr. Saroj Mukherji,)
   both of Bombay, Indian Inhabitants)
   residing at 3, Union Park, Chembur)
   Bombay.)
4. Mr. S.P. Varma,)
5. Mrs. V.S. Kapoor,)
   both of Bombay, Indian Inhabitants)
   residing at Karmashil Bungalow,)
   Road No. 7, J.V.P.D. Scheme,)
   Vile Parke (West), Mumbai 400 056) ... Respondents

Ms. Kashmira Bharucha i/b. Miss Anupama Binge for appellant.

None for respondent.

CORAM: R.M.S. KHANDEPARKAR
AND
D. G. KARNIK JJ.

DATE : June 8, 2007

ORAL JUDGMENT: (Per : R.M.S. KHANDEPARKAR J.)

1. Heard the learned counsel for the appellant. None present for the respondent though served. Perused the records.
2. The present appeal arises from order dated 5th August 1989 passed in Chamber Summons No. 1058 of 1998 in Summary Suit No. 889 of 1997. By the impugned order the learned Single Judge has rejected the Chamber Summons whereby the appellant had sought a direction to the respondent in terms of Order 21 Rule 41(2) of Civil Procedure Code. The application of the appellant in that regard has been dismissed holding that the same was pre-mature as there had been no application under Order 21 Rule 11(2) of Civil Procedure Code, 1908.

3. The learned advocate for the appellant placing reliance in the decision of this court in **United Phosphorous Ltd. Vs. A. K. Kanoria,** reported in **AIR 2003 Bombay 97** submitted that the provisions of law comprised in the Civil Procedure Code nowhere require that for the purpose of seeking information regarding the properties of the judgment debtor, there has to be an application under Order 21 Rule 41(2) of Civil Procedure Code on record. On the contrary, such information would be necessary to the decree holder to file an application Under Rule 11(2) and for seeking attachment of the property of the judgment debtor to recover the amount due and payable under the decree.

4. Order 21 Rule 41(2) of Civil Procedure Code provides that where a decree for the payment of money has remained unsatisfied for a period of 30 days, the court may on an application by the decree-holder and without prejudice to its power under sub- rule (1), require the judgment debtor or where the judgment debtor is a corporation any officer thereof to make an affidavit stating the particulars of the assets of the judgment debtor. The said provision of law

comprised under Rule 41 speaks of the procedure to be followed for attachment of the property in execution of the decree for payment of money.

5. Rule 11(2) of Order 21 of the Code of Civil Procedure relates to the written application for execution. It enumerates various particulars which are required to be furnished by the decree holder in an application for execution of a decree. Clause (j) of the said rule reads thus:

"(j) The mode in which the assistance of the Court is required whether -

i) by the delivery of any property specifically decreed;

ii) by the attachment , or by the attachment and sale, or by the sale without attachment, of any property;

iii) by the arrest and detention in prison of any person;

iv) otherwise, as the nature of the relief granted may require."

Evidently, the application for execution which is required to be filed in writing in terms of Order 21 Rule 11(2) of Civil Procedure Code should disclose the particulars of the property which the decree holder seeks to attach for recovery

of the money decreed in favour of the decree holder.

6. Rule 30 of Order 21 provides that every decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the detention in the civil prison of the judgment debtor , or by the attachment and sale of his property, or by both.

7. The provisions of law comprised under section 55 to 59 deals with the power of the court in relation to arrest and detention of judgment debtor in the process of execution of a decree whereas sections 60 to 64 deal with the power of the court as well as the liability of the judgment debtor and corresponding rights of the decree holder for attachment of the property of the judgment debtor in execution of a decree. Those sections make elaborate provisions regarding the proceedings which can be initiated against a judgment debtor in execution of a decree for payment of money. It is also settled law that in an execution proceeding of a money decree, the judgment debtor cannot be arrested and detained in a civil prison unless he is given an opportunity of either

complying with the decree or showing cause against the arrest and detention in jail. Similarly the properties which are exempted from attachment, as also certain restrains which are to be observed before ordering the attachment and sale of a property in an execution of the decree, are elaborately stated under sections 60 to 64 of the Civil Procedure Code.

8. Reading of all these provisions would apparently disclose that in order to disclose the properties in an application for execution by way of attachment of the property and sale thereof the decree holder must be aware of the properties which are available for attachment and which are statutorily exempted and unless this information is available to the decree holder, he may not be able to submit the application for execution under Order 21 Rule 11(2) of Civil Procedure Code complete in all respects. The provision of law comprised under Order 21 Rule 41(2) of Civil Procedure Code, in our considered opinion, cannot be said to be ancillary in strict sense to Order 21 Rule 11(2). Undoubtedly the provisions are in aid to the execution proceedings which can be initiated under Order 21 Rule 11

(2) of Civil Procedure Code. However, taking into consideration the requirement of the particulars which are to be disclosed in an application under Rule 11(2) and provisions of law comprised in Part II of Code of Civil Procedure, it cannot be said that such an application has necessarily to be filed only after filing or initiating the proceedings under Order 21 Rule 11(2) of Civil Procedure Code. Needless to say that nothing forbids the decree holder from seeking further information even after filing of the proceedings under section 11(2) by taking resort to Order 21 Rule 41(2) of Civil Procedure Code, but by no stretch of imagination it can be said that an application under section 21 Rule 41(2) would not lie unless the proceedings are initiated under Order 21 Rule 11(2) of Civil Procedure Code.

9. We are fortified in this view by the decision of the Division Bench as well as by the learned Single Judge (Shri D.G. Karnik J.) In fact the said decision is directly on the point in issue. In **United Phosphorous** case the point for consideration which arose was whether an application under Order 21 Rule 41 can be filed without filing an application

under Order 21 Rule 41(2) of Civil Procedure Code. After considering the various provisions of the Code of Civil Procedure and relying on the decision of the Division Bench in **Cooverji Varjang vs. Cooverbai Nagsey Champsey** reported in **1940 Bom. L.R. 564 = AIR 1940 Bombay 330** it was held that the contention that no chamber summons for seeking information regarding the property of the judgment debtor can be entertained and accepted without an application for execution under Order 21 Rule 11 of Civil Procedure Code is totally unacceptable.

10. In **Cooverji Varjang** case the Division Bench was undoubtedly dealing with a matter arising under Rule 50 of Order 21 of the Code of Civil Procedure. Sub Rule (2) of Rule 50 provides that where the decree holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of

such person be tried and determined in any manner in which any issue in a suit may be tried and determined. While considering the scope of the said provision, the Division Bench held that -

> "It is difficult to see what useful purpose is served in making an application to execute the decree before the leave has been granted. Mr. Munshi contends that an application in execution and one of the methods of execution which must be satisfied under Rule 11. But the application means one preliminary rule taking any effective step in execution against persons who are not covered by that Rule. Conceding that it is an application in execution, nevertheless, it is a special form of application which is covered by a rule. It seems to us that it is not apt to say that an application for leave under Rule 50 is a mode of execution referred to in Rule 11."

11. The Division Bench therefore has in clear terms held that an application for necessary leave under Order 21 Rule 50(2) of Civil Procedure Code would be a preliminary and effective step for initiating meaningful and purposeful execution proceedings. Applying the same rule to Order 21 Rule 41(2) of Civil Procedure Code, getting or obtaining the required information regarding the assets of the judgment debtor for the purpose of attachment of such property for sale and appropriation of the proceeds thereof for effective execution of the decree for payment of money would certainly be a preliminary step to take effective measure for execution of the decree for payment of money. Obviously the decreeholder would require such information at the time of filing of an application under Order 21 Rule 11(2) of Civil Procedure Code itself. Being so it goes without saying that an application under Order 21 Rule 41(2) certainly can be filed prior to the initiation of the proceedings under Order 21 Rule 11(2) of Civil Procedure Code.

12.There is yet another reason which would justify entertaining an application under Order 21 Rule 41(2) of Civil Procedure

Code prior to the initiation of the proceedings under Rule 11 (2) of Order 21. In a case where the judgment debtor holds properties in a place different from the one where the decree has been issued, a decree holder may have absolutely no knowledge about such properties. This information can be definitely collected from the judgment debtor himself who owns the property and the most authenticated method to collect such information would be by taking resort to provisions of Order 21 Rule 41(2) of Civil Procedure Code. To deny such opportunity to the decree holder would virtually amount to allow lawful decree passed by the court being rendered futile and meaningless.

13. Besides, section 60 of the Code of Civil Procedure enumerates the properties which are exempt from attachment and sale in execution of a decree for payment of money. Details of assets from the judgment debtor himself would certainly assist the Court in ascertaining the properties of the judgment debtor which should be excluded from the attachment and sale in the execution proceedings. The information from the judgment debtor regarding his assets prior to proceeding with

the application under Order 21 Rule 11(2) of Code of Civil procedure would be of advantage to the Court itself.

14. Needless to say that all the observations hereinabove are in relation to the maintainability of the application under Order 21 Rule 41(2) prior to the filing of the application under Order 21 Rule 11(2) and we have not expressed any opinion on the merits of the case in hand. The same shall be dealt with by the learned Single Judge on restoration of the application under Order 21 Rule 41(2) on remand thereof.

15. For the reasons stated above therefore we are of the considered opinion that the impugned order cannot be sustained and is liable to be set aside. Accordingly the appeal succeeds. The impugned order is hereby set aside. Chamber Summons No. 1058 of 1998 is restored to board. Considering that the matter relates to the year 1998 the learned Single Judge may consider to expedite the disposal of the Chamber Summons. There would be no order as to costs.

(R.M.S. KHANDEPARKAR J.)

(D. G. KARNIK J.)